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IN THE

Supreme Court of the United States

October Term, 1973

No. 73-1574

EDUARDO ARROYO,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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TABLE OF CONTENTS

	Page
Opinion Below	1
Jurisdiction	1
Questions Presented	2
Statement of the Case	2
Statement of Facts	3
The Evidence Against Arroyo	3
The "Spy on the Defense" Hearing	5
Reasons for Granting the Writ	9
I. The Intrusion of a Government Informer, Wrongfully Included as a Defendant in the Indictment, Into the Private Conferences Between the Petitioner and his Attorney Requires Reversal of the Conviction	9
II. The Exclusion by the Court Below of Extrinsic Evidence Relating to the Bias of Motive of the Witness Aviles to Testify Falsely Was Error	16
III. Pursuant to Rule 28(i) of the Federal Rules of Appellate Procedure, Arroyo Hereby Adopts by Reference the Points and Arguments of the Petitioners Sanchez, Gonzales, Perez and Ferrer, Insofar as they May be Applicable to the Petitioner Arroyo	21
Conclusion	22
Appendix A – Decision and Opinion of the United States Court of Appeals for the Second Circuit	A-1

TABLE OF AUTHORITIES

Page

Austin v. United States 418 F. 2d 456 (D.C. Cir. 1969) 19

Black v. United States 385 U.S. 26 (1966) 10

Caldwell v. United States 205 F. 2d 879 (D.C. Cir. 1953) 11

Coplon v. United States 191 F. 2d 749 (D.C. Cir. 1951) .....

Davis v. Alaska, – – U.S. – – (1974) 19

Giglio v. United States 405 U.S. 150 (1971) 14

Glasser v. United States 315 U.S. 60 (1940) 11

O'Brien v. United States 386 U.S. 345 (1967)..... 10

Santobello v. New York 404 U.S. 257 (1971) 13

United States v. Blackwood 456 F. 2d 526 (2nd Cir. 1972) ... 19

United States v. Haggett 438 F. 2d 396 (2nd Cir. 1971) 19

United States v. Harris 462 F. 2d 1033 (10th Cir. 1972) 14

United States v. Hayutin 398 F. 2d 944 (2nd Cir. 1968) 18

United States v. Lester 248 F. 2d 329 (2nd Cir. 1957) 19

United States v. Lusterino 450 F. 2d 572 (2nd Cir. 1971) 13

United States v. Mele 462 F. 2d 918 (2nd Cir. 1972) 11

United States v. Mosca 475 F. 2d 1052 (2nd Cir. 1973) 15

United States v. Rispo 460 F. 2d 965 (3rd Cir. 1972) 11

United States v. Rosner 485 F. 2d 1213 (2nd Cir. 1973) 11

United States v. Zarzour 432 F. 2d 1 (5th Cir. 1970) 15

United States ex rel Cooper v. Denno 221 F. 2d 626 (2nd Cir. 1955) 14

Misc:

Wharton's Criminal Evidence 13th Ed. Sec. 465 20

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The petitioner, Eduardo Arroyo, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit affirming their criminal convictions.

OPINION BELOW

The opinion of the Court of Appeals affirming the conviction appears in Appendix A to this brief. The District Court did not deliver an opinion.

JURISDICTION

The judgment of the Court of Appeals for the Second Circuit affirming the convictions was entered on March 22, 1974. This

petition for certiorari is filed within the thirty days of that date.

This Court's jurisdiction is invoked under 28 U.S.C. 1254 (1).

QUESTIONS PRESENTED

1. Is a reversal of the conviction required where a government informer, wrongfully included as a defendant in the indictment, intruded into the private conferences between the petitioner and his attorney?

2. Was it error to exclude extrinsic evidence relating to the bias and motive of the prosecution's chief witness to testify falsely?

STATEMENT OF THE CASE

Indictment 72 Cr. 1326 charged the petitioner, along with others, with conspiracy and a substantive crime. Count 1 alleged that the petitioner conspired 1) to import heroin into the United States; 2) to distribute and possess heroin with intent to distribute; and 3) to aid an attempt of a federal prisoner to escape. Count 2 charged the petitioner with distributing and possessing with intent to distribute heroin.

The petitioner was tried jointly along with Carlos Sanchez, Raphael Gonzales, Epifano Perez, and Julio Ferrer in the United States District Court for the Southern District of New York (BAUMAN, D.J. and a jury). Arroyo was convicted of both counts, and a special verdict specified that the objects of the conspiracy as to Arroyo were to import heroin and to distribute heroin. On July 30, 1973, the petitioner was sentenced to 15 years in jail on count 1, and ten years in jail on count two, the sentences to run consecutively, with three years of special parole to follow the completion of the 25-year sentence.

STATEMENT OF FACTS

The government's case alleged an international scheme to smuggle heroin into the United States in the summers of 1971 and 1972. The prosecution proof was primarily presented by two cooperating co-defendants, Alfredo Aviles and Alfredo Mazza, and by an undercover operative of the Joint Task Force, William Valentine, who posed as one "Gullermo", an associate of Aviles. The case was reinforced by numerous tape recordings of telephone conversations occuring in a hotel room Valentine and Aviles used as a communications center, and by several recordings through a transmitter placed on the person of Aviles. Many of the recordings were of telephone conversations with overseas members of the conspiracy, discussing plans and arrangements for the 1972 shipment. Essentially, the government alleged two shipments of heroin into the United States by a group operating in Belgium, Spain and Argentina. The first shipment arrived in a Volvo automobile from Belgium in the summer of 1971. The second shipment was seized in October, 1972, in Rio De Janeiro aboard a ship bound for the United States. A third object of the conspiracy, for which Arroyo was not convicted, involved an attempt to help Alfredo Mazza escape from jail in Florida, where he was confined in connection with another narcotics indictment.

THE EVIDENCE AGAINST ARROYO

Two witnesses, Alfredo Aviles and Alfredo Mazza, gave evidence implicating Arroyo. Both testified to events in June, 1971.

Aviles stated that he was engaged in a narcotics transaction with Alfredo Mazza in June and July, 1971. Mazza asked him to obtain a garage in New York where drugs could be taken from a car (655). Aviles contacted Arroyo and Gonzales who said that they could get a garage, but would have to wait a day (657). Aviles then explained that he was receiving drugs, and Arroyo told him not to sell it because he wanted to buy it (660). Arroyo said that if the drugs were good he would pay $14,000 per kilo,

but he would first have to test it (660). Since Aviles wanted a garage immediately, he obtained one himself (792), and Mazza and three Frenchmen arrived with a foreign car, possibly a Volvo, which they disassembled. They took the packages amounting to 72 kilos to Aviles' apartment, where Aviles kept 64 kilos and Mazza 8 (661-4). Then Aviles found Arroyo and Gonzales and brought them back to his apartment where they opened the packages and tested it with a glass of water. They also took a sample, and left. At 6 a.m. Arroyo returned with an American and took 49 kilos (665). At 6 p.m. that night Arroyo and Gonzales came back with $300,000 in cash (666). Two more payments were made in the ensuing days, Alfredo Mazza being present for the last payment (667).

Alfredo Mazza testified regarding this transaction that he was employed by a group in Belgium and Spain headed by Condemine to make all the arrangements in the United States (862-9). At the end of June, 1971 he was told to go to New York to get a garage ready, and he contacted Aviles for this purpose (870-1). After travelling to Europe, Mazza reentered the United States between July 8-11, 1971 under a false passport (874). He contacted Aviles and negotiated a price of $12,000 per kilo (876). On the way to the garage, Aviles introduced him to the "purchaser" for "a fleeting moment". This was Arroyo (880-1, 921). Mazza told Arroyo to be sure to bring large bills (881). The next day the car was disassembled and 72 kilos were taken from it (905). The car was a Volvo with Belgian plates (905). Mazza said he kept 8 kilos and Aviles took the rest. Every night thereafter Mazza went to Aviles' apartment to pick up payments which varied between $100,000 and $150,000, until full payment was made (909). The money was brought by Arroyo and Gonzales (910). Because Arroyo brought small denominations, Mazza told him he would have to have larger bills if he wanted to deal in the future. Arroyo replied that in the future he would put the money in a safe deposit vault and Aviles could verify the size of the denominations before Mazza delivered the merchandise (911).

The second transaction, involving 60 kilos of heroin to be shipped from South America, was described by Aviles and Valentine, and corroborated by tape recordings of the various communications made in conjunction with the transaction. As far as Arroyo was concerned, Aviles said he met Arroyo in June, 1972, and told him that he was going to receive a shipment of drugs. Arroyo replied that he was interested, but wanted to test it first (678). On June 21, Aviles was fitted with a transmitter which he could turn on and off with a switch (682, 802), and again met Arroyo. Present at this meeting as a possible buyer was one Louis Fraglioso, who, it was later revealed, was also a government informer. A discussion ensued, which was taped (Exh. 10; 890-902). The drugs, which the government alleged were the corpus of this importation, never reached the United States, the shipment being seized in Rio De Janeiro on October 4, 1972 in a fur shipment on board the SS Mooremacaltair (1082-4).

THE "SPY ON THE DEFENSE" HEARING

During the trial, a hearing was held to inquire into the facts surrounding the intrusion of Louis Fragliosi into the attorney-client conferences of the petitioner Arroyo and Gonzales. Fragliosi, who had been named as a defendant in the indictment in this case, was in reality a government informer all along. He remained listed as a co-defendant throughout the pre-trial period, until his case was eventually severed one week prior to trial.

Louis Fragliosi testified at the hearing that he was an informer for the government whose contact was BNDD agent Leonard Vecchione. He was in contact with Vecchione prior to the indictment in this case in December, 1972 (300-1, 305). After he was indicted he sought to learn from Vecchione why he had been charged, since he had been working for the government all along (314). During the pre-trial period, Fragliosi attended about 10 conferences with the petitioner Arroyo and Gonzales in the offices of their attorneys (302). At these meetings, defense planning

and strategy was discussed in detail, and Fragliosi, as the others, participated in making suggestions. The attorneys also made suggestions as to how the defense should proceed (304-5). These discussions included investigation and cross-examination plans (305). While Arroyo's attorney requested Fragliosi to bring his own lawyer to these conferences, he never did (306).

While attending these meetings, Fragliosi remained in close contact with agent Vecchione. He discussed with Vecchione the connection of Arroyo and Gonzales with the case, and told Vecchione the things he heard discussed in the meetings at the lawyers' office (307). Fragliosi specifically informed Vecchione of the plans to attack Aviles' credibility (308), and also of planned defense investigations (309). After reporting about 5 ot 6 meetings to Vecchione, the agent told Fragliosi that he didn't want to hear "any more" about it (309). This was sometime in February (317). But Fragliosi had told Vecchione after each of the first 5 or 6 meetings what had been planned at those conferences (310). However, after Vecchione indicated he did not want to hear any more, Fragliosi stopped telling him, although he did continue to attend meetings (310). After Assistant United States Attorney Velie specifically told him to stop going to the lawyers' offices, Fragliosi still went, although he did not tell the government what happened (311-12). However, the first 5 or 6 meetings occurred before Velie entered the case (315-16). Fragliosi admitted signing a statement in Velie's office to the effect that he had not revealed what he learned at the lawyers conferences, but explained that the statement was not true. He signed it because "I was a little under pressure at the time" (313). Later on, Fragliosi learned that the government felt it could not prosecute him (315), and pleaded with the government agents not to reveal his cooperation (316). In April Fragliosi told Velie that co-defendant Rodriguez had a contract out to kill Aviles, and that Arroyo wanted to plead guilty (320-1).

Leonard Vecchione, group supervisor of the BNDD, testified that Fraglioso was cooperating with him, and had been

cooperating in December, 1972 (576, 585). Vecchione would speak with Fragliosi "practically every night" (589). While Vecchione acknowledged that Fragliosi told him that he attended conferences between Arroyo and his attorneys, he alleged that Fragliosi did not relate what had transpired at the lawyers' office (591). Fragliosi was called to meet with Velie in his office on February 21, where the case was reviewed. Vecchione told Velie what he "had authorized Fragliosi to do" and Fragliosi related "the roles that Mr. Arroyo and Mr. Gonzales played in this case" (586, 592, 693). Since Vecchione had told Velie that Fragliosi "had gone to the lawyers with them because Mr. Arroyo didn't understand what was going on" (588), Velie told Fragliosi at this February meeting to stay away from the defendants and their lawyers,and if he did become aware of defense strategy, not to reveal it (577-8, 580-1). Sometime after this meeting, Velie told Vecchione that Fragliosi "may have been indicted in error" (581) and that the charges against him would be dropped (578-9). When this was decided, Velie told Fragliosi on the phone to stay away from the defendants, and told Vecchione to tell the same thing to Fragliosi when they met, which Vecchione did (581-2). On April 3, Fragliosi was brought to the United States Attorneys office at night. He told the prosecutor a co-defendant, Rodriguez, had put a contract out on Aviles' life (582-4).

Later, in April, Fragliosi told Vecchione that Arroyo wanted to plead guilty if he thought he could get 10 years (695), and Fragliosi arranged a meeting for Arroyo with Vecchione (697). When Velie was informed, the prosecutor told Vecchione not to listen to particulars about the defense, but to see only if Arroyo wanted to cooperate (711). If something was blurted out about the case, Vecchione should not tell Velie about it (712). There were three meetings in all between Fragliosi, Arroyo and Vecchione. At the first meeting, Vecchione identified himself to Arroyo as an agent, and told Arroyo that he didn't have to talk to him. Vecchione concealed his relationship with Fraglios, however (713-15). At this meeting, Arroyo said he was in trouble, that he just had a new baby. He showed Vecchione baby pictures, and

then began to cry (699). Arroyo didn't say more than two words, and Fragliosi did all the talking (699-700). The second meeting was similar, and at the third meeting Arroyo just kept crying (704). Fragliosi said, however, that Aviles was the "bigwig in the case" and Arroyo "was getting blamed for everything" (705). Vecchione told Velie that the meetings had occured, but that nothing had happened at them (707). After the third meeting, Velie told Vecchione to stay away from Arroyo (708). Vecchione did not participate in the preparation of this case (584), and made no notes or records of his conversations with Fragliosi (590).

Franklin B. Velie, the Assistant in charge of this case, testified that he was assigned the case at the end of January or the beginning of February, 1973, when there had already been an indictment (717). Fragliosi's lawyer, Mr. Epstein, told Velie that Fragliosi was wrongfully indicted since he was a BNDD informant, and that the Task Force officers who made the case, had made a mistake (718). Vecchione confirmed that Fragliosi had been acting on his instructions (718). Velie learned these facts within a week of receiving the case, and stated that Assistant United States Attorney Higgens also told him about it (718-19). The Assistant in charge of the case before Velie, Mr. Rohrer, had also known of this, but had no investigated it (739). Velie then investigated the situation, and it appeared that the acts that led to the indictment of Fragliosi had been authorized by Vecchione (719). On February 21, Velie held a meeting to determine whether Fragliosi "Wasn't trying to slip one past us" (720). Fragliosi told him at length what he had done (727) and described his relationship with Arroyo (741-3). He also stated that he didn't want to testify (745). After the meeting Velie made a preliminary finding that Fragliosi was indicted in error (721). The prosecutor told Fragliosi that if what appeared to be true turns out to be the case, he would not try him, but warned Fragliosi to stay away from the defendants (721). Later it was decided to nolle the case against Fragliosi, and he told Fragliosi on the phone "very clearly and emphatically" to stay away from

the defendants (722). Velie also told Vecchione to tell Fragliosi the same thing, and if anything did come to Vecchione's attention, he was not to communicate it to Velie (723-24). Velie told this to Fragliosi in person on April 3 (725).

Velie stated that he only learned two things from Fragliosi which were reported to him by Vecchione. First, the allegation that Rodriguez had a contract out to kill Aviles, and second, that Fragliosi believed Arroyo wanted to plead guilty (725, 748). He received no information from Fragliosi or Vecchione about the defense (732).

REASONS FOR GRANTING THE WRIT

I. THE INTRUSION OF A GOVERNMENT INFORMER, WRONGFULLY INCLUDED AS A DEFENDANT IN THE INDICTMENT, INTO THE PRIVATE CONFERENCES BETWEEN THE PETITIONER AND HIS ATTORNEY REQUIRES REVERSAL OF THE CONVICTION.

Introduction

Louis Fragliosi was indicted along with the petitioner Arroyo for the crimes charged in this indictment. As the government conceded, however, he was in fact "not a true defendant" (740), but rather participated as a government informer operating under the aegis of BNDD agent, Leonard Vecchione. While the case against Fragliosi was eventually nolled one week before trial, he had by this time attended numerous meetings between the petitioner Arroyo and his counsel, during which detailed and specific defense plans and strategies were discussed by all participants in the meetings (304-5). While Fragliosi's attendance at the meetings after February 21, 1973 was contrary to the instructions of the prosecutor, Mr. Velie, his presence at five or six meetings before this date must be viewed in an entirely different light. For before Velie was assigned to the case and started his investigation which confirmed Fragliosi's lack of culpability,

Fragliosi continued serving as Vecchione's informant, unfettered by any instructions to the contrary. Indeed, he spoke to Vecchione, as the agent conceded "practically every night" (589), and specifically told Vecchione that he attended meetings between Arroyo and his lawyer (591).* And, of utmost importance, since Vecchione had authorized Fragliosi's participation in the events which led to the indictment (586, 718-19), the BNDD agent surely knew that Fragliosi was a sham defendant. Thus, by maintaining his business-as-usual relationship with Fragliosi, Vecchione not only acquiesced in the intrusion into private and privileged defense conferences, but, undoubtedly, was aware that Fragliosi's penetration into the lawyer-client relationship of the appellant was aided by the false cover provided Fragliosi by his inclusion in the indictment. In fact, Vecchione apparently did nothing to alter the situation until, after Fragliosi had already attended five or six meetings, Velie ordered Vecchione not to listen to any report Fragliosi might give to the defense strategy sessions. Indeed, it is instructive that Velie was first alerted to Fragliosi's erroneous indictment by Fragliosi's lawyer (718), and not by Vecchione, who knew the true facts all along.

Accordingly, the conduct of agent Vecchione, as a representative of the government, in fostering Fragliosi's invasion into the privacy of the appellant's attorney-client relationship amounts to government intrusion of the grossest kind which irretrievably poisoned the case. A reversal is therefore required under the decisions in ***Black v. United States,*** 385 U.S. 26 (1966); ***O'Brien v. United States,*** 386 U.S. 345 (1967); ***Coplon v. United***

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* Though Vecchione stated that Fragliosi did not tell him what went on at these meetings (591), Fragliosi testified that he did indeed relate what occurred at the conferences (307). As Judge Bauman sagely observed, he would "almost take judicial notice of the fact . . . that when an informer is working for a law enforcement agency he tells them everything that's going on. That's what he is there for" (587). Despite this, the Court did say that he was "inclined to believe" Vecchione rather than Fragliosi (753, 757-8).

States, 191 F. 2d 749 (D.C. Cir. 1951); *Caldwell v. New Jersey,* 205 F. 2d 879 (D.C. Cir. 1953); *United States v. Rispo,* 460 F. 2d 965 (3rd Cir. 1972); *United States v. Mele,* 462 F. 2d 918 (2nd Cir., 1972), and under the most recent decision of the Second Circuit dealing with the privacy of legal conferences, *United States v. Rosner,* 485 F. 2d 1213 (2nd Cir. 1973), cert. pending.

I.

In *Rosner* the Court discussed at length the principles applicable to "spy on the defense" cases. Recognizing that such intrusions present a "serious constitutional claim, for the essence of the Sixth Amendment right is, indeed, privacy of communication with counsel. *Glasser v. United States,* 315 U.S. 60 (1942)" the Court wrote that the first step in analyzing such situations is that "a finding of unlawful intrusion must precede the determination of its consequences". 485 F. 2d at 1224. In *Rosner* the Court held that there was no unlawful governmental intrusion on the facts of that case. However, every operative fact pointed to by the Court to show a lack of governmental culpability there is oppositely presented here, thus leading to the opposite conclusion – that is, at least before February 21, 1973 the repeated penetration of the government informer into Arroyo's defense was an unlawful breach of constitutional dimension.

In *Rosner* it was alleged that two co-defendants, Lamttina and DeStefano, intruded into conferences between Rosner and his attorneys. The Court held that 1) there was no evidence that the government knew that DeStefano was seeing Rosner or his lawyers, 2) while DeStefano and Lamattina were for a time "helping the government in certain respects", "they were not general informers", 3) that "they had each specifically abjured the role of informer against Rosner", and 4) there was no proof that Lamattina and DeStefano were "sham defendants". *Id.* or 1226. Because of these findings, there occured only a "type of non-prejudicial 'cooperation' " which "falls short of inviting the

application of a per se rule". *Ibid.* In the present case, in complete contrast, Fragliosi was a "general informer" providing specific information against Arroyo. Far from abjuring cooperation against the appellant, Fragliosi in fact provided information about Arroyo's participation in the crime not only to Vecchione, but also to Velie at the February 21 meeting (586, 592, 693, 727, 741-3). There is thus every indication that Fragliosi cooperated to the fullest extent possible against Arroyo. Moreover, the government knew that Fragliosi was privy to Arroyo's defense, since he reported every one of his meetings to Vecchione (591), who, knowing that Fragliosi was repeatedly attending, did nothing until ordered by Velie on February 21st to discourage him from going.

Furthermore, there is ample proof in this record that Fragliosi was a "sham" defendant, and that Vecchione, knowing he was a sham defendant, used him to penetrate the attorney-client conferences of Arroyo in this guise. In this regard, it is important to remember that Vecchione had authorized Fragliosi's participation in the events which led to the indictment (586, 718-19), and therefore knew all along that his informer was not a true defendant. Yet Vecchione did nothing to stop Fragliosi from attending Arroyo's legal conferences. He neither gave Fragliosi any cautionary instructions such as Velie later gave, nor is there any evidence in this record that he brought the matter to the attention of the United States Attorney until asked. Indeed, the prosecutor was first warned of the situation by Fragliosi's attorney (718), and not by Vecchione. Of course, it is hardly unrealistic to imagine that Vecchione would be rather satsified with the status quo — his informer, with the added cover of appearing as a defendant in the indictment, having penetrated the innermost counsels of the defense. Indeed, it is not without interest that the tactic of using a sham defendant to infiltrate defense lawyer-client discussions was not exactly unknown to agent Vecchione. He participated in the same scheme in *United States v. Mele,* 462 F. 2d 918 (2nd Cir. 1972). In any event, in the two months before Velie came to grips with the proglem, Agent Vecchione was using

his informer who he knew was a sham defendant in exactly the manner condemned in *United States v. Rispo,* 460 F. 2d 965 (3rd Cir. 1972); *United States v. Mele, supra;* and *United States v. Lusterino,* 450 F. 2d 572 (2nd Cir. 1971); cf. *Rosner*, 485 F.2d at 1226-7. Indeed, in *Rosner* the Court characterized such a use of "a dummy defendant" as "the ultimate in the chicanery of unlawful intrusion". 485 F. 2d at 1227. The fact that Velie terminated the masquerate when he nolled Fragliosi's case one week before trial does not, of course, excuse the government, through its agents Vecchione and Fragliosi, of the misconduct they earlier perpetrated. Velie's efforts to insulate the case after February 21st simply came too late, for Fragliosi had already attended five or six meetings between Arroyo and his attorney.

Below, the prosecution attempted to mitigate the damage by arguing that Vecchione, a BNDD agent, was not part of the Joint Task Force which made the present case, and did not participate in the preparation of the trial. The claim, apparently, is that the Task Force and the United States Attorney did not know that Fragliosi was an informer and therefore a sham defendant, and that they should not be held accountable for Vecchione's knowledge and actions. It is, however, too late in the day to argue that, insofar as the government is concerned, the right hand can ignore what the left hand is doing. See, *Santobello v. New York,* 404 U.S. 257, 262 (1971). Agent Vecchione was as much "the government" as was the task force, and his knowledge and conduct is attributable to the government. It does not, of course, detract one iota from Arroyo's Sixth Amendment right that one agency of the government was listening in and another agency was not. Indeed, in *Black v. United States,* 385 U.S. 26, *supra,* the defendant was being prosecuted for income tax evasion by the Tax Division of the Justice Department. Unknown to the Tax Division attorneys, agents of the F.B.I. in an unrelated matter installed a listening device in Black's hotel room and overheard conversations between the petitioner and his attorney. Despite the fact that the prosecutors did not realize until after the trial that such conversations were overheard, the conviction was

reversed. The fact that the encroachment into the defendant's legal conferences was made by a government agency other than the one responsible for the preparation of the case did not relieve the government from the burden of the errors of one of its branches. Also see, e.g. *Santobello v. New York,* 404 U.S. 257, 262 (1971); *Giglio v. United States,* 405 U.S. 150, 154 (1972); *United States v. Harris,* 462 F. 2d 1033 (10th Cir. 1972). Consequently, the fact that Vecchione was a BNDD agent not directly concerned with the preparation of this Task Force case is not relevant. In any event, Vecchione participated in the questioning of Fragliosi in Velie's office on February 21 concerning the role of Arroyo and Gonzales in the case (586, 592, 693, 727, 741-3), and was therefore associated to some degree in readying the government's case against the appellant. There can thus be little doubt that, in contrast to *Rosner,* the government unlawfully intruded into the counsels of Arroyo's defense, with the full connivance of Agent Vecchione.

II.

The type of intrusion involved in this case requies the application of the *per se* rule discussed in *Rosner*. 485 F. 2d at 1227-8. In *Rosner* the Court held that if the government is guilty of intruding into the privacy of defense legal conferences, there is no need for a showing of actual prejudice. Such, indeed, was the holding in cases where illegal eavesdropping accomplished the intrusion as in *Black* and *O'Brien* or where a "dummy defendant" is tuilized, as in *Rispo*. The one is no different than the other, as was held in *Caldwell*. The reason, of course, is that not only is the intrusion far beyond the tolerable bounds of government impropriety, but also it is next to impossible for the defendant to prove actual prejudice. *Glasser v. United States,* 315 U.S. 60 (1942); *United States ex rel. Cooper v. Denno,* 221 F. 2d 626, 631 (2nd Cir. 1955) (Frank, J. concurring). If the intruder is in communication with government agents, it is almost inevitable that at least something of what he learns at counsel meetings will seep into the intelligence he provides.

Indeed, unless notes or reports are made of what the informer reports, there is no objective way to trace the prejudice. In the present case it must therefore not be forgotten that Vecchione never made any notes or reports of his meetings with Fragliosi after he attended the defense strategy sessions (590).

In *Rosner*, the only alleviation of unlawful government intrusion from the *per se* rule is the absence of an "opportunity for prejudice". "Where there is no opportunity for prejudice, even governmental intrusion will not require reversal. *United States v. Mosca*, 475 F. 2d 1052 (2nd Cir. 1973); see also, *United States v. Zarzour*, 432 F. 2d 1 (5th Cir. 1970)." slip op. 5376. Stated another way, once unlawful government intrusion is shown, there is no need to show actual prejudice. It is sufficient for reversal if there was an opportunity for prejudice. Clearly, there was such an opportunity here, since this case does not approach the parameters described by *Mosca* and *Zarzour* where no prejudice could have occured. In *Mosca*, the only meetings the spy attended were two pretrial conferences in which the government attorneys and the judge were present. These conferences, of course, were neither privileged nor private, and there was no opportunity for prejudice since everything overheard in them by the informer was also heard by the government whether or not the informer was present. Obviously, that was not the situation at the conferences Fragliosi attended, since they were intended to be private and privileged meetings between Arroyo and his counsel. In *Zarzour* the government alleged that there had been no communication at all between the informer and the government agents. There thus could not have been any transmittal of matters the informer learned. Here, in contrast, Vecchione was in contact with Fragliosi "practically every night" (589), and was told by Fragliosi that he had attended defense conferences. He also discussed the role of Arroyo in the crimes for which he was indicted with Fragliosi (585-6). Obviously, the opportunity for prejudice was real, since even by Vecchione's testimony, he was constantly communicating with Fragliosi and discussing the case with him during the time he knew that Fragliosi was par-

ticipating in Arroyo's attorney-client meetings. Indeed, it is highly suggestive that after Vecchione was told by Velie not to listen to anything that Fragliosi had to say about meetings Fragliosi attended, Vecchione always told Fragliosi point blank and in specific terms that he did not want to hear about it. The insertion of this caution on several occasions after Fragliosi reported attending another meeting makes it highly likely that Fragliosi was in the habit of reporting fully whatever he learned unless told not to. After all, what was Fragliosi doing at the meetings anyway, if not pursuing his profession of government informer. Indeed, as Judge Bauman observed, it is the business of an informer to inform (587). It would therefore be surprising if Fragliosi did not convey the interesting information he learned during the pre-February 21st meetings to Vecchione who was, undoubtedly, more than interested to hear about it, until Velie directed that he no longer be curious. Therefore, since extensive communication concerning the Arroyo case did occur between Fragliosi and Vecchione prior to February 21st, an opportunity for prejudice clearly existed in the situation.

III.

The present case requires dismissal of the indictment against Arroyo. *Rosner* indicated such a result would follow the application of the *per se* rule where, as here, there appears to be nothing tangible to exclude from evidence, and thus no alternate way to remedy "such a pervasive defect". 485 F. 2d at 1228. In *Rosner* the Court pledged that "if circumstances warranted it we would not shrink from such a result." *ibid.* The circumstances in the present case warrant that result.

II. THE EXCLUSION BY THE COURT BELOW OF EXTRINSIC EVIDENCE RELATING TO THE BIAS OR MOTIVE OF THE WITNESS AVILES TO TESTIFY FALSELY WAS ERROR.

Two of the original defendants in the indictment were Benjamin Rodriguez and Ralph Torres. Rodriguez was mentioned in

overt act 9 as being at a certain address (where he met with Aviles [Mins. of April 13, 1973, p. 4]), and Torres was accused in overt act 11 of placing a telephone call on September 20th to the hotel where Valentine and Aviles were staying. On April 13, 1973, counsel for Rodriguez brought information to the attention of the court indicating that Aviles had framed both Rodriguez and Torres. Counsel stated that he had been contacted by Aviles' wife, one Elizabeth Alicia,* who said that she had previously been married to the defendant Rodriguez. She stated, in a taped interview, that Aviles thought she was still seeing Rodriguez and that he "was going to see to it that Ben Rodriguez was put away; he was going to take care of Ben" (Mins. April 13, p. 6). After the arrest of Rodriguez and Torres in December, Aviles told her "I will give you your husband back for Christmas" and told her to give certain information to Rodriguez's attorney. The information was that one Eddie Esquijarossa, and not Ralph Torres, had made the September 20th telephone call at Aviles' request, that he pretended to be Ralph Torres, and that Aviles had concocted this scheme to injure Rodriguez. This information was turned over by counsel to the United States Attorney, and Elizabeth Alicia was interviewed by the government and testified in the grand jury. In April, 1973 Aviles appeared at his home in Puerto Rico and told Elizabeth that he had escaped from protective custody. He went into a violent rage against her and beat her viciously. He told her that he had heard the tape of her interview with Rodriguez's counsel, and threatened to kill her if she testified against him. He also threatened to "put her in a narcotics conspiracy", and threatened to kill her children as well (Mins. of April 13, pp. 12-14). Aviles was later pursued by agents, escaped from them, werecked his car, and was found with a gun (*id.* p. 14). On April 25, 1973 the defendants Rodriguez and Torres were severed from the case before trial upon motion on the government. (Joint appendix, p. 9).

At the trial, the defense naturally sought to inquire into these

* Elsewhere referred to as Isabel Irlanda.

events. On cross-examination of Aviles, he admitted knowing Esquijarossa and speaking to him in September, but denied telling Esquijarossa to call Valentine, and pretend to be someone else (841-2). Aviles also denied telling his wife that he had framed Rodriguez and Torres or that he had told her that he instructed Esquijarossa to call Valentine, using the name Ralph Torres, and discuss narcotics with him (850). He did admit learning later that it was in fact Esquijarossa who called Valentine, and not Torres (853). He learned this at the United States Attorney's office when he listened to the tape of the September 20th conversation and recognized Esquijarossa's voice (854).

The predicate questions having been laid during cross-examination (see, *United States v. Hayutin*, 398 F. 2d 944, 953 (2nd Cir. 1968), the defense sought to put Elizabeth Alicia on the stand (1197-1218). The court below ruled that "if all this woman is going to testify to is about Torres, Rodriguez and Esquijarossa . . . I don't regard that as admissible evidence" (1214). Since she had no evidence to give other than Aviles' attempt to frame Torres and Rodriguez, and his further attempt to intimidate her into silence, she was not called (1217).

Petitioner submits that this ruling was error, since a witness may be impeached by extrinsic evidence relating to motive or bias. If it is relevant to show that Aviles was motivated to frame a defendant, as it always is, it should certainly be relevant to show that he had in fact framed two people in the same case, and then used violence and threats to suppress testimony of his fabrications.

There is no doubt that Aviles had a good motive to make cases for the government. He was not only under indictment in the present case, but had been indicted in two other narcotics cases in the Southern District of New York. Additionally, he faced a narcotics charge in the Eastern District of New York, and another one in federal court in Miami. He also faced an assault charge in New Jersey, and a gun charge in Puerto Rico (652, 774,

784, 806). Moreover, Aviles' employment as a government informer did not distract him from his main work – selling heroin, since Aviles continued to sell narcotics during the summer of 1972 (838-9). In limited fashion, Aviles said only that he expected his cases to be consolidated (784-7), but the prosecutor revealed, at least to the Court and counsel, that Aviles was told his cooperation would be brought to the attention of the court (816).* While the jury was thus aware that Aviles had a motive to frame defendants, the ruling of the court below deprived the jury of the important proof indicating how deeply he was motivated. It is one thing to be motivated to frame; it is another to actually do it. Undoubtedly, if the jury had known these facts, Aviles' credibility, which may have been blemished, would certainly have disappeared.

Courts have stated on many occasions that "bias or interest of a witness is not a collateral issue, and . . . extrinsic evidence is admissible thereon". *Davis v. Alaska,* ––U.S.–– (1974); *United States v. Haggett,* 438 F. 2d 396, 399; *United States v. Lester,* 248 F. 2d 329, 334 (2nd Cir. 1957); *United States v. Campbell,* 426 F. 2d 547 (2nd Cir. 1970); *United States v. Blackwood,* 456 F. 2d 526 (2nd Cir. 1972). And courts have shown "great solicitude for an endeavor by the accused to establish bias on the part of a prosecution witness". *Austin v. United States,* 418 F. 2d 456 (D.C. Cir. 1969); *Davis v. Alaska,* ––U.S.–– (1974). While the proferred testimony of Aviles' wife would, of course, establish a direct motive to frame Rodriguez, it also shows that Aviles was motivated to carry his accusations beyond the bounds of a specific bias. Thus, not only did he attempt to frame Rodriguez, but he also tried to frame Torres. His motive to frame people and make additional cases for the government, while at the same time scoring additional points for himself, accordingly reached out in a rather indiscriminate manner. The jury was

* His cooperation was obviously appreciated, for in October, 1973 Aviles was sentenced to a suspended 15 year term and probation for his many federal crimes.

entitled to know this for any fair assessment of Aviles' truthfulness on the stand.

Indeed, the depths of Aviles' motives for testifying falsely are further evidenced by another aspect of Elizabeth Alicia's expected testimony. It will be recalled that Elizabeth described not only a frame-up, but also an attempt by Aviles to suppress the evidence of that frame-up, by beating her and threatening her with a narcotics prosecution or death (Mins. of April 13, p. 12). Certainly, a witness may be impeached by extrinsic evidence that he attempted to suppress or fabricate evidence, or that he attempted to dissuade a witness from attending the trial (see, cases in Wharton's, Criminal Evidence, 13th Ed. Sec. 465). Aviles' wife, as far as he knew, was going to be a witness against him. He had already heard the tape of her conversation with Rodriguez's lawyer, and undoubtedly knew she had testified before the grand jury. His attempt to suppress her evidence clearly relates directly to his motivations in the matter. Indeed, there can be no question that Aviles' motive to free himself from his many difficulties with the government were important enough to him to dampen any inhibitions about perjuring himself on the stand. The attempt to fabricate testimony and send innocent men to jail for extended periods, coupled with the attempt to suppress proof of his fabrication by a vicious assault upon a prospective defense witness and death threats to her and her children are powerful proof against accepting Aviles at his word. There is no way that the jury could have adequately assessed his truthfulness in this matter without access to such testimony (see, *Davis v. Alaska*, — —U.S.— — (1974)), and the court below should have allowed it in the case.* While the government argued that Aviles' motive was shown by the charges he faced, and there were tapes to

* It is unlikely that the introduction of Elizabeth Alicia's testimony would be outweighed by the counterveiling features in such cases, consumption of time or confusion of issues. The consumption of time would not be great, since the defense offered only the one witness to testify to these facts. Moreover, there could hardly be a serious confusion of issues, since Aviles' credibility and motives were already in issue, and the allegations of his wife would be easily understandable to a jury.

corroborate some of what he was saying, there is nevertheless no doubt that the jury would have regarded Aviles in a wholly different light if presented with testimony that he actually engaged in lawless and illegal conduct directly relating to the case being tried in order to insure favorable treatment by the government. The test in such situations is whether "the jury was otherwise in possession of sufficient information concerning the formative events to make a discriminating appraisal of a witness' motives and bias". *United States v. Campbell,* 426 F. 2d 547, 550 (2nd Cir. 1970); *United States v. Blackwood,* 456 F. 2d 526, 530 (2nd Cir. 1972). In the present case, then, it is an incomplete answer to say that the jury knew Aviles had a motive to lie because of the open charges against him. For they did not know that his motive was so powerful that he would deliberately frame innocent people and violently attempt to silence the witness who would expose him. They did not, in short, know the great lengths to which he would go to avoid the penalties of his past misdeeds; that he would deliberately commit more crimes to avoid payment for his past ones. Such a motive to falsify would, as the Court observed in *Blackwood, supra,* "color every bit of testimony given by the witness whose motives are bared." 456 F. 2d at 530. The jury should have known about it in full. *Davis v. Alaska,* — — U.S. — — (1974).

III. PURSUANT TO RULE 28(i) OF THE FEDERAL RULES OF APPELLATE PROCEDURE, PETITIONER ARROYO HEREBY ADOPTS BY REFERENCE THE POINTS AND ARGUMENTS OF THE PETITIONERS SANCHEZ, GONZALES, PEREZ AND FERRER, INSOFAR AS THEY MAY BE APPLICABLE TO THE PETITIONER ARROYO.

CONCLUSION

THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE GRANTED

Respectfully submitted,

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Appendix

APPENDIX — Decision and Opinion of the United States Court of Appeals for the Second Circuit

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 498, 499, 503, 524, 673—September Term, 1973.

(Argued January 9, 1974 Decided March 22, 1974.)

Docket Nos. 73-2193; 73-2332; 73-2339; 73-2511; 73-2311

UNITED STATES OF AMERICA,

Appellee,

v.

EDUARDO ARROYO, JULIO FERRER, RAFAEL GONZALEZ, EPIFANIO ROSA PEREZ and CARLOS SANCHEZ,

Appellants.

Before:

DANAHER,* LUMBARD, and TIMBERS,

Circuit Judges.

Following a jury trial before Honorable Arnold Bauman, District Judge, all appellants appeal from judgments of conviction of conspiracy to import, possess and distribute heroin, 21 U.S.C. §§ 846, 943 and to assist in the escape of a federal prisoner, 18 U.S.C. § 752. Appellants Arroyo, Gonzalez and Perez further appeal their conviction of possessing heroin with the intent to distribute, 21 U.S.C. §§ 812, 841.

Affirmed.

* Senior Circuit Judge for the District of Columbia Circuit, sitting by designation pursuant to 28 U.S.C. § 294(d) (1970).

FRANKLIN B. VELIE, Esq., Assistant United States Attorney (Paul J. Curran, Esq., United States Attorney for the Southern District of New York and John J. Kenney and S. Andrew Schaffer, Assistant United States Attorneys, of Counsel), *for Appellee.*

ALBERT J. KRIEGER, Esq., New York, N. Y. (Krieger, Fisher, Metzger & Scribner; Alan Scribner, of Counsel), *for Appellant Arroyo.*

JAY GOLDBERG, Esq., New York, N. Y., *for Appellant Perez.*

ALVIN K. HELLERSTEIN, Esq., New York, N. Y. (Paul S. Levy, Esq., Stroock & Stroock & Lavan, of Counsel), *for Appellant Sanchez.*

STANLEY M. MEYER, Esq., of Brooklyn, N. Y. (Preminger, Meyer & Light, of Counsel), *for Appellant, Gonzalez.*

JULIO R. FERRER, *Appellant, Pro se,* Coral Gables, Florida.

DANAHER, *Senior Circuit Judge:*

The massive conspiracy here involved all five appellants,[1] convicted after a jury trial, following the importation, possession and distribution of heroin, and their joining in an effort to bring about the escape of a federal prisoner. The jury additionally found that Arroyo, Gonzalez and Perez were guilty of possessing heroin with the intent to distribute. Perhaps most important of the various claims of error is that advanced by Arroyo and Gonzalez that a

1 And others who were foreign nationals or in fugitive status or were severed from trial.

Government informant,[2] after the indictment had been returned, improperly had attended meetings of these two accused and their lawyers, thus violating their Sixth Amendment right to a confidential attorney-client relationship. This aspect of the case will hereinafter be discussed, but otherwise we have no difficulty in concluding that the appellants were in no way deprived of a fair trial. The judgments of conviction are affirmed.

I.

We need only generalize to provide the background for the prosecution and the trial, for it is clear enough that each participant must have known that he was involved in one of the largest[3] heroin importation conspiracies of recent years. We view the facts, as we should, most favorably to the position of the Government, *Glasser* v. *United States*, 315 U.S. 60, 80, (1942), *United States* v. *McCarthy*, 473 F.2d 300, 302 (2 Cir. 1972), *United States* v. *Tropiano*, 418 F.2d 1069, 1074-1075 (2 Cir. 1969), *cert. denied* 397 U.S. 1021 (1970). One Alfredo Mazza, a salesman for European heroin sources, arranged with one Alfredo Aviles, agent for American buyers, for the importation in July, 1971, of some 80 kilograms of uncut, European heroin, concealed in various parts of a Volvo automobile. The car was dis-

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2 One Louis Fragliossi in other unrelated narcotics violation situations had acted on occasion as an informant for a BNDD Group Supervisor, Leonard Vecchione. Originally named as a defendant in the pending indictment, Fragliossi was severed one week prior to the trial.

3 The three shipments of heroin hereinafter to be mentioned totaled approximately 300 kilograms which over the period here involved had a "street" value of more than $68,000,000. *See* New York State Commission of Investigation, *Narcotics Law Enforcement in New York City*, 36 (1972). After the trial, during a pre-sentence colloquy, Judge Bauman observed that Arroyo had been dealing in heroin at a million dollars a transaction. He continued:

> In my extensive experience this is the largest single transaction with which I have ever been confronted.

mantled in a Manhattan garage pursuant to arrangements by the appellant Perez. Some 64 kilograms of heroin, the subject of the substantive count, were delivered from the garage to the Aviles apartment. There, appellants Arroyo and Gonzalez met with Aviles. Gonzalez tested a portion of the heroin, indeed he carried away a sample for further testing, and thereafter Gonzalez and Arroyo took delivery of some 49 kilograms of heroin and made payment of more than a half million dollars.

Next followed in January, 1972, a second shipment of some 176 kilograms of heroin which, however, was seized in Florida—and so were Mazza, Aviles and Arroyo. Mazza was unable to post bail but Aviles did so for himself and then undertook arrangements for a further consignment of heroin expecting to use a portion of the proceeds of its sale in posting bail for Mazza. While cooperating with Alfredo Mazza's brother Carlos and with Mazza's lawyer, the appellant Ferrer and their European heroin supplier, one Condemine, Aviles found himself named in another narcotics indictment. Aviles presently agreed to introduce an undercover agent,[4] Sergeant Valentine, into the continuing conspiracy. With the plan to free the jailed Mazza still having high priority, Aviles met with Arroyo and one Fragliossi, who agreed to purchase heroin upon the arrival of the expected shipment.

Meanwhile, appellant Ferrer asked for and received a flexible saw to be smuggled to and used by Alfredo Mazza to facilitate his escape if the conspirators should fail to secure his release. At trial, appellant Ferrer, the only one of the accused to testify, admitted receiving the saw but testified that he had never delivered it to the federal prisoner.

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4 Working thereafter with Aviles was an operative of the Joint Task Force, William Valentine, who posed as one "Guillermo".

In August, 1972 Aviles talked with Gonzalez who expressed interest in obtaining heroin from the expected shipment, and also with the appellant Sanchez. Thereafter, during the course of a taped conversation with Sergeant Valentine alias Guillermo,[5] Sanchez was assured that the shipment[6] of heroin expected from overseas sources was of high purity, and Sanchez agreed to take 30 kilograms of that heroin at a price of $18,000 per kilogram.

II.

The foregoing outline of the Government's case against those on trial is deemed adequate to depict the far-reaching and on-going nature of the crimes charged and of the participation of each of the accused in effectuating its objects. Repeatedly Judge Bauman most carefully instructed the jury that evidence as to each of the charges was to be considered separately in the determination of the guilt or innocence of each participant. He required the jury to indicate by special verdict the degree of involvement, if any, by each of the accused and of the association by each

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5 Sanchez has argued that he could not be convicted of conspiracy with the other codefendants since his arrangements for participation had been made with Aviles and Valentine who, it developed at trial, were acting as agents of the Government. As to that point Judge Bauman instructed the jury:

> However, if you find that these agents acted as connecting links between Sanchez and the Belgian and Argentinian co-conspirators you may find that Sanchez was a member of the conspiracy charged in the indictment * * * * I instruct you that Mr. Sanchez can be found guilty of the conspiracy only if he knew and intended to join those who intended to import and sell heroin as I have charged you.

6 That particular lot of heroin, consisting of 60 kilograms, secreted in bales of sheepskins consigned to a New York City furrier was seized aboard a steamer in Brazilian waters. Government agents there took samples of the heroin which, pursuant to stipulation of all counsel, were received in evidence, having been tested by a government chemist and having been found to be 78 per cent pure heroin.

with the objects[7] of the conspiracy if the jury were to find one to exist. The understanding and the discernment of the jury are entirely apparent from the verdicts as rendered.[8]

It has been asserted, not by Arroyo, but by Perez, Ferrer, Gonzalez and Sanchez that the evidence against each of them was not sufficient to justify submitting their cases to the jury. We reject out of hand any such claim. Compare the facts as narrated in *United States* v. *Barrera*, 486 F.2d 333 (2 Cir. 1973). It has become clear beyond peradventure that

> we are not dealing with minor league addicted street pushers but with well-financed brazen professionals engaged in a large-scale criminal undertaking. . . . *United States* v. *Bynum*, 485 F.2d 490, 499 (2 Cir. 1973).

It has been urged upon us that there was error in the refusal of the trial judge to instruct the jury as to the possibility of multiple conspiracies. Such a claim has received consideration in this court before now, and it has often been recognized especially where heroin is involved, that it would be unrealistic to assume that major producers, importers, wholesalers or retailers do not know that their actions are inextricably linked to a large on-going

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7 Those objects were, as listed in the instructions:

1. To import heroin;
2. To distribute heroin;
3. To assist Alfredo Mazza to escape from prison.

8 The docket entries show the jury's responses to the special verdict requirement concerning individual participation in achieving the conspiratorial objects outlined above, note 7:

> As to Arroyo, Nos. 1 and 2 existed; as to Ferrer, objects Nos. 1, 2 and 3 were established; as to Gonzalez, objects Nos. 1 and 2 were proved; as to Perez, only object No. 1 existed; as to Sanchez, the jury found involvement as to objects Nos. 1 and 2. (And see Transcript, 1474, 1475, 1476)

plan or conspiracy. Only one conspiracy was alleged and proved. *United States* v. *Barrera, supra; United States* v. *Bynum, supra,* 485 F.2d at 495-496; *United States* v. *Cirillo,* 468 F.2d 1233, 1238-1240 (2 Cir. 1972), *cert. denied,* 410 U.S. 989 (1973); *United States* v. *Calabro,* 449 F.2d 885, 891-893 (2 Cir. 1971), *cert. denied,* 405 U.S. 928 (1972); *United States* v. *Nuccio,* 373 F.2d 168, 174 n. 4 (2 Cir.) *cert. denied,* 387 U.S. 906, *rehearing denied,* 389 U.S. 889 (1967). There was no error on this aspect.

We reject, without enumeration, assorted claims of error as to various other rulings running through some two weeks of a well-conducted trial. *See, generally,* our treatment in *United States* v. *Barrera, supra, United States* v. *Bynum, supra, United States* v. *Calabro, supra,* and *United States* v. *Agueci,* 310 F.2d 817 (2 Cir. 1962), *cert. denied,* 372 U.S. 959 (1963).

III.

Before the severance from the case of co-conspirator Rodriguez, his counsel in the course of preparation had interviewed Aviles' wife.[9] The conversation was taped. What she then said Aviles had earlier told her became in part the subject of cross-examination of Aviles by respective counsel for Arroyo and Gonzalez. With the trial about to terminate, whether the woman should be brought from Puerto Rico came under discussion.

Arroyo has briefed extensively a claim that what the woman had told Rodriguez's counsel should have been received to demonstrate Aviles' bias and interest. Counsel argued that

> the jury would have regarded Aviles in a wholly different light if presented with testimony that he actually engaged in lawless and illegal conduct directly relating

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9 She previously had been married to Rodriguez.

to the case being tried in order to insure favorable treatment by the government. (Brief for Arroyo).

We now explore the pertinent background.

After Aviles in 1972 undertook cooperation with Sergeant Valentine, he dealt with various of the parties on trial and with others of the originally indicted defendants. Among the latter were Aviles himself and Ralph Torres and Benjamin Rodriguez as to whom on April 25, 1973, Judge Bauman granted a motion to sever.

Pressed to disclose what promises had been made by the Government in return for his collaboration, Aviles testified there had been no assurances of leniency or of special treatment, and that all he hoped for was that cases outstanding against him would be brought on all at one time and before the same judge. Arroyo's counsel on a different tack presently asked if Aviles in January, 1973 was locked up in Puerto Rico for beating his wife and received a negative reply. Arroyo's counsel put the question "Would you frame someone?", with Aviles answering "Why should I do that?" Counsel replied "To get yourself out from under. That's why."

Counsel for Gonzalez took up cross-examination, particularly with reference to the interview with Aviles' wife taped by counsel for Rodriguez. It was thereupon developed that Aviles knew Torres, Rodriguez and one Alberto Esqui Jarosso. Allowing great latitude, Judge Bauman permitted counsel for Gonzalez to have access to the grand jury testimony of Aviles' wife when the Government investigated possible obstruction of justice. Cross-examination thereafter resulted in testimony by Aviles that he never told the woman that he had framed Rodriguez and Torres, and that he had never told her that he had arranged for Esqui Jarosso to pretend he was Torres and thus to telephone Sergeant Valentine to discuss narcotics

with him. When Aviles was asked whether he had while in Puerto Rico struck or harmed his wife in any way, the prosecutor objected and was sustained.

The foregoing background has been supplied in some detail for an understanding of developments after the Government rested its case. Some six weeks after all concerned knew of the taped interview of Aviles' wife, counsel for Gonzalez brought up the possibility of bringing the Aviles woman from Puerto Rico to New York. Extending discussion by the court and counsel concerning a time schedule resulted in a general agreement that the defense would make an effort to ascertain whether or not the Aviles woman would testify that Aviles had tried to frame one of the defendants on trial. As guidance to counsel Judge Bauman commented:

> Now, I want to make this clear to you. If all this woman is going to testify to is about Torres, Rodriguez and Esqui Jarosso, save yourself the money because you have now made an offer of proof and I tell you that I don't regard that as admissible evidence. (Transcript, 1214).

The following morning the judge asked: "What have you got to report?" Counsel for Gonzalez informed the judge that the lady was interviewed "last night"; she will not testify that Aviles framed either Gonzalez or Arroyo or any other defendant on trial, and "there would be no point in producing her, as Your Honor indicated yesterday". (Transcript, 1217).

No exception was noted by Arroyo respecting Judge Bauman's handling of the matter. Gonzalez on brief to this court has not even mentioned the incident. We would have taken no notice of the point had not Judge Bauman, perhaps in an excess of caution, given consideration to the belated claim advanced only on the last day of the trial.

Moreover the trial judge in great detail instructed the jury that in evaluating the testimony of any witness, the jury was to weigh his possible interest and to consider bias or prejudice including all varieties of hostility. Should it be found that a witness had testified falsely, the jury was free to reject all of his testimony or to accept such part of it as might be found to be reliable.

Specifically,

> It is for you to decide whether a participant in the crime, such as Aviles or Mazza, is telling the truth or perjuring himself in the hope of obtaining some concession from the government or the Court. (Transcript, 1417).

We are entirely satisfied that no error has been made to appear. *Cf. United States* v. *Blackwood*, 456 F.2d 526, 529, 530 (2 Cir. 1972).

IV.

We now turn to what seemed at first blush to have been a point of significant proportions, indeed Judge Bauman felt impelled to conduct in the absence of the jury a series of hearings to ascertain the exact facts. Arroyo and Gonzalez had claimed that the fairness of their trial had been so tainted as to require a dismissal of the indictment on the ground that the Government had initiated an unlawful intrusion upon the confidential relationships between these accused and their counsel. They have here asserted their right to a *per se* rule which would require a reversal of the judgments of conviction without any showing of prejudice on their part.

It turned out that Louis Fragliossi on occasion had served as an informant for Leonard Vecchione who was a group supervisor for the Bureau of Narcotics and Dan-

gerous Drugs. Vecchione had had nothing to do with the development of the instant case which had been worked up under the aegis of Sergeant Valentine of the New York Task Force. Like Gonzalez and Sanchez, Fragliossi had agreed to purchase heroin upon the expected arrival of the heroin, the proceeds of the sale of which were to be used in securing the release on bail of Mazza, in prison in Florida. So it was that the indictment, in part involving that third shipment, named Fragliossi as one of the original defendants. On the face of it, Fragliossi had shared a common interest with Arroyo and Gonzalez.

Fragliossi, called as a witness by counsel for Arroyo, testified that he had been indicted with the others in December, 1972. Arroyo's counsel brought out that Fragliossi had indeed attended with Arroyo and Gonzalez defense strategy discussions. Methods of attacking the credibility of Aviles were planned and a program for conducting investigations of Aviles was under consideration. Fragliossi rejected defense counsel's suggestion that his attorney attend the meetings.

Instead, Fragliossi's attorney disclosed to Assistant United States Attorney Velie that

> his client had been indicted for a crime he did not commit, and explained that Mr. Fragliossi had been an informant during the entire thing and had been indicted by mistake by this other agency. He explained that Mr. Fragliossi had been an informant for the BNDD but had gotten indicted in a Task Force case for acts which he had been carrying out with relation to the BNDD.

Checking with Supervisor Vecchione, Velie learned

> that Vecchione had been working Fragliossi as an informant and had directed certain of his activities,

and Mr. Vecchione felt Mr. Fragliossi had been indicted in somebody else's case for the actions he, Vecchione, had authorized.

Mr. Velie further checked with other Assistant United States Attorneys and various Task Force agents who were the "case agents" and in charge of the file and familiar with the facts underlying the instant investigation. Finally satisfied[10] that Fragliossi had been mistakenly named as a defendant in the indictment because of acts which Vecchione had authorized, Mr. Velie nolled the case as to Fragliossi.

Under cross-examination by government counsel it was developed that Fragliossi was nevertheless concerned[11] as the record reveals.

Q. You repeatedly spoke, did you not, with Mr. Vecchione asking him how come you have been indicted?

A. Yes.

• • • •

Q. Do you recall being instructed by Mr. Vecchione not to reveal at any time anything some defendant may have told you about this case?

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10 It seems clear enough that Mr. Velie was anxious to avoid even a suspicion that Fragliossi could be deemed a "sham" defendant. Undoubtedly he was not unaware of what had been said in *United States* v. *Lusterino*, 450 F.2d 572 (2 Cir. 1971) where one Grillo, as a sham defendant, on the stand had confessed to joint guilt with Lusterino. At page 575, *id.*, Judge Smith, writing for the court in reversing the conviction, said

> When the prosecution participates in allowing a false picture to be painted, it bears a heavy burden of showing that it could not have affected the verdict. It has not shown that here.

11 That Fragliossi had deemed himself suspect for apparent double-dealing seems clear enough; and if indeed he was "upset", it was not without reason, for shortly after the trial Fragliossi was murdered.

A. That is the time when he threw his hands up and said: I don't want to hear nothing more about this.

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Q. You also knew, did you not, that since you had been indicted it might be necessary for the Government to reveal the fact that you had been in contact with an agent?

A. Yes.

Q. You were very upset about that; were you not?

A. Yes.

Q. You pleaded with various government officers numerous times not to reveal that?

A. Yes.

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Q. Did Mr. Vecchione tell you not to tell him what, if anything, was going on on the defense side?

A. Could I say it in my own words?

The Court: Yes.

A. After we discussed it a few times, then he says to me—that is what he said to me: I don't want to hear any more about it, and he threw his hands up.

The foregoing random excerpts from the cross-examination by government counsel culminated in Fragliossi's testimony that he had not discussed any of the matters under inquiry with any other government officer.

Judge Bauman was fully aware[12] of the nature of the problem unfolding before him. Only a month earlier he

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12 The trial judge asked whether or not after some five or six meetings at the defense lawyer's office Fragliossi had told Mr. Vecchione what had happened. The witness answered:

Yes, I discussed them, you know, what happened. I discussed my case. I discussed what was going on.

had been confronted with the claim that any intrusion by the Government into defense strategy, *ipso facto*, "taints the entire prosecution", as he noted in *United States* v. *Cohen*, 358 F.Supp. 112, 129 (S.D.N.Y. 1973). He there had observed that the Second Circuit does not follow cases which apply a *per se* rule, citing *United States* v. *Mosca*, 475 F.2d 1052, 1060-1061 (2 Cir.), *cert. denied*, 412 U.S. 948 (1973).[13]

Further details were developed in testimony by Vecchione and by Assistant United States Attorney Velie.[14] The defense motion to dismiss was denied. As the record shows, Judge Bauman ruled:

The inquiry continued:

The Court: Did you tell Mr. Vecchione what was being planned between defendants in those five or six meetings?

The Witness: I think I did.

The Court: After about the fifth or sixth meeting Mr. Vecchione said: I don't want to hear anything more about that; is that right?

The Witness: He threw his hands up. He says: I don't want to hear anything more about this.

The Court: Did you, after that occasion, ever discuss with him any other meetings of counsel and defendants?

The Witness: No, I don't remember. I'm not sure, I just asked him about my case, you know.

13 *And see United States* v. *Rosner*, 485 F.2d 1213, 1224 (2 Cir. 1973): We conclude, however, that a finding of unlawful intrusion must precede the determination of its consequences. We can make no such finding here. Judge Bauman, after hearing the witnesses, found to the contrary. . . . [W]e are convinced, on our own review of the evidence, that the Government has sustained its contention beyond a reasonable doubt".

14 For example, Vecchione directed Fragliossi to keep away from meetings with Arroyo and Gonzalez and their counsel. Government counsel Velie warned Vecchione that if Fragliossi should blurt out anything he might have learned, Vecchione was not to pass along such information to the prosecution. It appears that there was no unlawful intrusion by the Government into defense counsels' conferences, indeed the defense has not alleged prejudice. Moreover, Judge Bauman found that no prejudice had appeared, and we agree. *See* n. 13, *supra*.

> Now it's denied because I haven't seen the slightest —slightest evidence that would tend to support any poison reaching into the levels of Government at which this prosecution would have resulted in a deprivation of the defendant's [sic] right to counsel.

The judge accepted the word of Group Supervisor Leonard Vecchione,

> that he was not told what Fragliossi heard in the meeting, and certainly therefore, that since he hadn't heard he couldn't have passed it on to anybody important in the prosecution team.

The judge continued:

> I find Mr. Vecchione credible on this subject and I prefer his testimony to that of Mr. Fragliossi as I think almost anyone listening to them would be inclined to do.

After further observations, Judge Bauman specifically took the position:

> At any rate, my conclusion is even assuming all that, there is nothing sufficient in this case to have poisoned the prosecution, and as I have previously indicated, I find as a fact none of it passed on to any member of the prosecution team.[15]

We are satisfied that once the mistaken indictment of Fragliossi was discovered, the Government's representatives took entirely proper steps to insure that the defense

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15 Judge Bauman's finding is conclusive. Had privileged information acquired by Fragliossi while a codefendant—or even after the severance—been passed along to the prosecution, a very different problem would have been presented. *Cf. Giglio* v. *United States*, 405 U.S. 150, 154 (1972); *Santobello* v. *New York*, 404 U.S. 257, 262 (1971).

would not be compromised. We join Judge Bauman in his conclusion that there was no violation of the appellants' Sixth Amendment rights.

Such other miscellaneous claims as have been urged are lacking in merit and require no discussion. We are completely persuaded that the trial was fairly and properly conducted.

The judgments of conviction are in all respects

Affirmed.